2007

Sharlene Francisconi v. Becky Hall : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SHARLENE FRANCISCONI, Plaintiff/Appellee, v. BECKY HALL, Defendant/Appellant.	**APPELLEE'S BRIEF** Apeal Case No. 20070331 District Ct. No. 040922431

APPEAL FROM THE JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, ON APRIL 3, 2007, JUDGE, PRESIDING

Gregory M. Constantino, (A 6853)
CONSTANTINO LAW OFFICE, P.C.
8537 S Redwood Rd., Suite D
West Jordan, UT 84088
(801) 748-4747
FAX: (801) 748-4747

Attorney for Plaintiff and Appellee

E. Craig Smay
E. Craig Smay, P.C.
174 East South Temple
Salt Lake City, Utah 84111
(801) 539-8515
FAX: (801) 539-8544

Attorney for Defendant and Appellant

IN THE UTAH COURT OF APPEALS

SHARLENE FRANCISCONI, Plaintiff/Appellee, v. BECKY HALL, Defendant/Appellant.	**APPELLEE'S BRIEF** Apeal Case No. 20070331 District Ct. No. 040922431

APPEAL FROM THE JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, ON APRIL 3, 2007, JUDGE, PRESIDING

Gregory M. Constantino, (A 6853)
CONSTANTINO LAW OFFICE, P.C.
8537 S Redwood Rd., Suite D
West Jordan, UT 84088
(801) 748-4747
FAX. (801) 748-4747

Attorney for Plaintiff and Appellee

E. Craig Smay
E. Craig Smay, P.C.
174 East South Temple
Salt Lake City, Utah 84111
(801) 539-8515
FAX: (801) 539-8544

Attorney for Defendant and Appellant

TABLE OF CONTENTS

STATEMENT OF LACK OF JURISDICTION AND MOTION TO DISMISS 1

DETERMINATIVE RULES AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 28

ARGUMENT 29

POINT I THE ISSUES REGARDING THE SET ASIDE OF THE ORDER ENTERED ON JANUARY 19, 2005, ON APPEAL HAVE BEEN INADEQUATELY BRIEFED. 29

POINT II: APPELLANT HAS NOT OBTAINED A TRANSCRIPT OF THE EVIDENTIARY HEARING HELD ON DECEMBER 19, 2005, AND HAS FAILED TO MARSHALL THE EVIDENCE. THUS, APPELLANT MAY NOT NOW ATTACK THE FINDINGS OF FACT ENTERED IN THIS CASE. 32

POINT III: THE TRIAL COURT PROPERLY APPLIED RULE 54 OF THE UTAH RULES OF CIVIL PROCEDURE IN SETTING ASIDE THE ORDER ENTERED ON JANUARY 19, 2005. 33

POINT IV: THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION IN DENYING DEFENDANT BECKY HALL'S MOTION TO FILE AMENDED ANSWER AND COUNTER-CLAIM. 36

POINT V: THE CONTRACT AND EVICTION ISSUES HAVE BEEN INADEQUATELY BRIEFED. 37

POINT VI: THE TRIAL COURT CORRECTLY CONCLUDED THE PARTIES ENTERED INTO THE REAL ESTATE

CONTRACT, WHICH WAS A LEGALLY ENFORCEABLE AGREEMENT. 39

POINT VII· THE TRIAL COURT CORRECTLY CONCLUDED THAT BECKY HALL WAS IN BREACH OF SAID REAL ESTATE CONTRACT, AND, AS SUCH, PLAINTIFF WAS ENTITLED TO A DECLARATION OF FORFEITURE PURSUANT TO UTAH CODE SECTION 78-36-10. 42

CONCLUSION AND PRECISE RELIEF SOUGHT. 45

NON-REQUEST FOR ORAL ARGUMENT 45

CERTIFICATE OF SERVICE 46

APPENDIX 47

TABLE OF AUTHORITIES

CASES CITED:

Adair v. Bracken, 745 P.2d 849, 852 (Utah App. 1987) 41

Butler v. Wilkinson, 740 P.2d 1244, 1255 (Utah 1987) 26, 27

Central Florida Investiment, Inc. v. Parkwest Associates, 40 P.3d 599, 605 (Utah App. 2002). 40

Doelle v. Bradley, 784 P.2d 1176 (Utah1989) 33

Green River Canal Co. v. Thayn, 84 P.3d 1134, 1141 (Utah 2003) 40

Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992) 40, 42

Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah App.1990) 33

Johnson v. Austin, 748 P.2d 1084, 1086 (Utah1988) 24, 41, 42

Johnson v. Higley, 989 P.2d 61, 72 (Utah App. 1999) 40, 42

Kelly v. Hard Money Funding, Inc. 87 P.3d 734, 742 (Utah App. 2004) 29, 36

Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184 (Utah App.1987) 32, 39

Lee v. Barnes, 977 P.2d 550, 552 (Utah App.1999) 40, 43

Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 455 (Utah App.1988) . . 38

Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994) 36

Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1216 (Utah Ct. App. 1989) 36

Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 385 (Utah App.1991) 34

Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 4445 (Utah App.1988) 34

Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) 34

State v. Garza, 820 P.2d 937, 939 (Utah App.1991) 32, 39

State v. Price, 827 P.2d 247, 249 (Utah App. 1992) 32, 39

State v. Thomas, 961 P.2d 299, 305 (Utah 1998) 31, 39

Timm v. Dewsnup, 851 P.2d 1178, 1184-85 (Utah 1993) 34

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994) 28, 31, 33, 34

Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct.App.1989) 2

Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 657 (Utah1988) 38

DETERMINATIVE RULES AND STATUTORY PROVISIONS:

The full texts of the following determinative Rules and Statutes are reproduced at Addendum.

Utah Code Ann.

Utah Code Section 78-2-2 . . . . . 1, 2

Utah Code Section 78-36-3 . . . . . .2, 24, 43, 44

Utah Code Section 78-36-10 . . . . . .2, 24, 25, 27, 42, 44, 45

Utah Rules of Civil Procedure

Rule 15 . . . . . 2, 36

Rule 54 . . . . . 2, 28, 31, 33, 34

Utah Rules of Appellate Procedure

Rule 3 . . . . . 1, 2

Rule 4 2

Rule 24 . . . . . 2, 32

IN THE UTAH COURT OF APPEALS

SHARLENE FRANCISCONI, Plaintiff/Appellee, v. BECKY HALL, Defendant/Appellant.	**APPELLEE'S BRIEF** Appeal Case No. 20070331 District Ct. No. 040922431

APPEAL FROM THE JUDGMENT AND ORDER OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE HONORABLE DENISE LINDBERG, ON APRIL 3, 2007, JUDGE, PRESIDING

STATEMENT OF LACK OF JURISDICTION AND MOTION TO DISMISS APPEAL

In Appellant's Brief, Appellant states that this Court has jurisdiction on the basis Utah Code § 78-2-2(4). However, Utah Code § 78-2-2(4) does not give this Court jurisdiction where the Appellant filed a Notice of Appeal on April 18, 2007, giving Notice that Appellant was appealing the Judgment of the District Court entered herein April 3, 2007, including without limitation the incorporated rulings of the Court January 11, 2006, setting aside the earlier Judgment in the matter, and July 11, 2006, refusing leave to amend defendant's Answer and the April 3, 2007 order (Appellant's Opening Brief, Exhibit E) is not a final order. The final order is the Judgment and Order entered by the Court on May 3, 2007. (Addendum I) Because the Appellant did not appeal the final order, this court lacks jurisdiction to consider the appeal.

Rule 3 of the Utah Rules of Appellate Procedure contains "The Final Judgment Rule",

which says that an appeal of right must be taken "from all final orders and judgments." When an appeal is taken from an order that is not the final order, this court lacks jurisdiction to consider the appeal. See *Utah R. App. P. 3(a)*. Further, the Notice of Appeal must be within 30 days after the final order Utah R. App. P. 4(a). In this case, that thirty-days from May 3, 2007, the date the Judgment and Order was entered by the Court. Thus, the thirty (30) days for the time to file a Notice of Appeal, ran on June 2, 2007. Because the appeal was not properly taken, the proper remedy is dismissal.

When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct.App.1989). Thus, the Court should dismiss the Appellant's appeal.

DETERMINATIVE RULES AND STATUTORY PROVISIONS

The full texts of the following determinative Rules and Statutes are reproduced at Addendum.

A. Utah Code Section 78-2-2

B. Utah Code Section 78-36-3

C. Utah Code Section 78-36-10

D. Rule 15 of the Utah Rules of Civil Procedure

E. Rule 54 of the Utah Rules of Civil Procedure

F. Rule 3 of the Utah Rules of Appellate Procedure

G. Rule 4 of the Utah Rules of Appellate Procedure

H. Rule 24 of the Utah Rules of Appellate Procedure

STATEMENT OF THE CASE

A. Nature of the Case.

The case was an eviction proceeding. Plaintiff/Appellee commenced suit, pursuant to Utah Code Section 78-36-1 et. seq. to evict Defendant BECKY HALL from the home located at 1131 Electra Lane, in Sandy, Utah.

B. Course of this Proceeding.

On October 22, 2004, Plaintiff/Appellee SHARLENE FRANCISCONI filed a Complaint (Unlawful Detainer) alleging that Plaintiff is the owner of the property located at 1131 East Electra Lane, in Sandy, Utah. The complaint further alleged that Defendant/Appellant BECKY HALL was a tenant at will and Plaintiff was entitled to an Order of Restitution directing an appropriate officer to remove the Defendant from the premises. District Court File, pgs. 1-3)

On October 28, 2004, Defendant filed an Answer. (District Court File, pgs. 8-11) On November 18, 2004, Plaintiff moved the court, pursuant to Utah Code Ann. Section 78-36-8.5, to set a possession bond. (District Court File, pgs. 12-13) The Court set the bond amount and Plaintiff paid the bond amount in compliance with the Court's order. (District Court File, pgs. 14-18) A Notice to Occupant(s) of Setting and Payment of Bond was served on Defendant Hall. Defendant Hall requested a hearing, which was set for December 22, 2004. (District Court File, pgs. 20-21).

On December 22, 2004, a hearing was held Defendant's request for bond hearing. A transcript of the hearing is in the District Court File at pages 62 - 64. At the hearing, the parties agreed to defer any further proceedings until the parties had an opportunity to exchange information and have further settlement discussions. (District Court File, pgs. 62-63, and pgs. 267 - 273)

On January 19, 2005, the Court entered an Order drafted by Defendant/Appellant`s attorney. (District Court File, pgs. 24 - 26, and pgs. 267 - 273)

On March 31, 2005, Defendant/Appellant moved the court for an Order to Show Cause to enforce the January 19th Order. (District Court File, pgs. 27- 37, and pgs. 267 - 273). The court issued the Order to Show Cause and set a hearing for April 28, 2007. (District Court File, pgs. 38 - 39, and pgs. 267 - 273) Plaintiff/Appellee filed an Objection to Motion for Order to Show Cause on or about April 7, 2004. (District Court File, pgs. 42 - 50, and pgs. 267 - 273)

On April 25, 2004, Jax H. Petty withdrew as counsel for Plaintiff/Appellee. (District Court File, pgs. 52, and pgs. 267 - 273) At the hearing set for April 28, 2007, Plaintiff/Appellee was represented by Gregory M. Constantino who requested a continuance of the Order to Show Cause. (District Court File, pgs. 53-54, and pgs. 267 - 273) The Court granted Plaintiff/Appellee's request and the matter was set for May 9, 2005. (District Court File, pgs. 53-54, and pgs. 267 - 273)

On May 6, 2005, Plaintiff/Appellee filed an Opposition to Order to Show Cause, and a Motion to Set Aside Order and Motion to Allow the Parties to Resume Litigation. (District Court File, pgs. 71 - 107, and pgs. 267 - 273) The Opposition and Motion to Set Aside Order were supported by the Affidavit of Jax Petty re: Entry of Order and the Affidavit of Sharlene Francisconi. (District Court File, pgs. 56 - 68, 108 - 122, and pgs. 267 - 273) At the hearing held on May 9, 2005, the Court entered an order which set aside the January 19th Order, required the parties to attend mediation, and set the matter for trial on June 3, 2005. (District Court File, pgs. 131 - 133)

On June 3, 2005, the matter came on for hearing before the Hon. L.A. Dever. The Court treated the hearing as a status conference based on the fact that Defendant/Appellant refused to go to mediation. The Court stayed the order setting aside the January 19th Order pending a response from defendant. (District Court File, pgs.134)

Defendant/Appellant filed an Opposition to Motion to Set Aside Order on June 14, 2005. (District Court File, pgs. 135 - 163) Plaintiff/Appellee filed a Reply to the Opposition to Motion to Set Aside Order. (District Court File, pgs. 164 - 170)

On June 15, 2005, Defendant/Appellant filed a Motion to Disqualify Judge L.A. Dever from further proceedings on the case and the Motion was supported by the affidavit of Becky Hall. (District Court File, pgs. 161 - 166) On September 1, 2005, the Court granted Defendant/Appellant's Motion to Disqualify, and on September 19, 2005, Judge Deno G. Himonas was assigned to the case. (District Court File, pgs. 173 - 176)

On October 12, 2005, Plaintiff/Appellee filed a Second Notice to Submit for Decision requesting that the Court set Plaintiff's Motion to Set Aside Order for hearing. (District Court File, pgs. 180 - 181) Then, the Court set the Motion to Set Aside Order for hearing on October 28, 2005. (District Court File, pgs. 182 - 183)

At the hearing held on October 28, 2005, the Court determined that the Motion to Set Aside Order and Motion to Allow the Parties to Resume Litigation is essentially a Motion to Enforce (or not) an alleged settlement agreement. The Court determined that an evidentiary hearing was necessary to make the determination, and set the evidentiary hearing for December 19, 2005. (District Court File, pgs. 184 - 188)

After a half day evidentiary hearing held on December 19, 2005, the Court entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW. (District Court File, pgs. 266 - 274) The FINDINGS OF FACT AND CONCLUSIONS OF LAW set aside the January 19th Order, and allowed the parties to proceed with the litigation. (District Court File, pgs. 266 - 274)

On June 13, 2006, Defendant/Appellant HALL filed a Motion for Leave to File Amended Answer and Counter-claim. (District Court File, pgs. 372 - 383) Plaintiff/Appellee filed an

Opposition to Motion for Leave to File Amended Answer and Counter-claim on June 29, 2006. (District Court File, pgs. 392 - 397) Defendant/Appellant HALL filed a Reply to: Objection to Motion for Leave to File Amended Answer and Counter-claim on July 7, 2006. (District Court File, pgs. 447 - 452) The District Court denied the Defendant/Appellant HALL's Motion for Leave to File Amended Answer and Counter-claim in a written memorandum entered by the Court on July 12, 2006. (District Court File, pgs. 465 - 472)

After some further delay, the matter went to trial on January 3, 2007. The Court entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER on April 3, 2007. For reasons not understood by counsel for Appellee, the FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER is not a part of the District Court File. However, the FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER is attached to Defendant/Appellant's Docketing Statement and is attached to Appellant's Opening Brief as Exhibit E.

C. Statement of the Facts concerning the Order entered January 18, 2005, as established at the evidentiary hearing held on December 19, 2005.

Plaintiff SHARLENE FRANCISCONI filed the above-entitled eviction action seeking to evict Defendant BECKY HALL from the home located at 1131 Electra Lane, in Sandy, Utah. (District Court File, pgs. 267 - 273, parag. 1)

Defendant BECKY HALL was served a three-day Summons and Complaint for Eviction and Defendant filed an answer. Through Plaintiff's attorney, Mr. Jax Pettey, Plaintiff moved the Court to set a possession bond. The Court set the bond amount at $2,700 and Plaintiff posted the bond. Defendant BECKY HALL was served with a Notice of Occupant(s) of Setting and Payment of Bond.

(District Court File, pgs. 267 - 273, parag. 2)

In reaction to the Notice, Defendant BECKY HALL, by and through her attorney, filed DEFENDANT'S DEMAND FOR A HEARING AND NOTICE OF SETTING. As required by Utah Code Section 78-36-8.5, the Court set a hearing to determine the amount of the counter bond to be paid by Defendant, and that hearing was scheduled for December 22, 2004, at 1:30 p.m. (District Court File, pgs. 267 - 273, parag. 3)

Prior to the hearing, Jax Pettey called Craig Smay. The parties attorneys had a brief conversation at about 11:00 a.m. on the day of the hearing, where Mr. Pettey said that his client wanted to work something out. Then, Mr. Pettey and Mr. Smay had a brief meeting in the hall just before the hearing on December 22, 2004. (District Court File, pgs. 267 - 273, parag. 4)

Mr. Pettey again told Mr. Smay that SHARLENE FRANCISCONI wanted to work something out. During the settlement, Mr. Pettey acknowledged that BECKY HALL had provided $30,000.00 toward the purchase price for the real property located at 1131 Electra Lane. Mr. Smay asserted that Ms. HALL had made improvements to the property and had made all but two payments on the mortgage. Mr. Pettey informed Mr. Smay that Ms. FRANCISCONI claimed to have made all the payments on the 1131 Electra Lane home since late April, 2004. Also, Mr. Smay informed Mr. Pettey that Defendant HALL was also claiming that improvements had been made to the 1131 Electra Lane home. As a result, the parties had a dispute regarding the money paid by Ms. HALL to purchase and maintain the 1131 Electra Lane home. (District Court File, pgs. 267 - 273, parag. 5)

Mr. Pettey told Mr. Smay that Ms. FRANCISCONI was interested in obtaining an appraisal of the 1131 Electra Lane home. Both, Mr. Pettey and Mr. Smay acknowledged that understanding the value of the home was going to be important in order to go forward with further discussions. (District Court File, pgs. 267 - 273, parag. 6)

The parties discussed and agreed that each party should provide the other party with information regarding the payments made by either party toward the purchase and maintenance of the 1131 Electra Lane home. The parties discussed and agreed that Ms. FRANCISCONI could obtain an appraisal of the 1131 Electra Lane home, and that Ms. HALL would cooperate so that Ms. FRANCISCONI could obtain the appraisal. Further, the parties agreed that each party would provide the other party with any appraisal the other party had obtained. (District Court File, pgs. 267 - 273, parag. 7)

The parties agreed to meet, after the exchange of the payment information and the appraisals, and at such meeting the parties would attempt to agree on an amount to be paid by Ms. FRANCISCONI to Ms. HALL to settle the above-entitled litigation, and to settle Ms. HALL's claims to the real property located at 1131 Electra Lane. (District Court File, pgs. 267 - 273, parag. 8)

In the meantime, Ms. FRANCISCONI agreed to not pursue her remedies in the above-entitled eviction proceeding, including not to pursue the immediate removal of Ms. HALL from the real property located at 1131 Electra Lane, in order for the parties to have the time to obtain appraisals, exchange payment information, and pursue settlement negotiations. (District Court File, pgs. 267 - 273, parag. 9)

On December 23, 2004, Mr. Pettey sent a fax to Mr. Smay addressing the areas discussed on December 22. First, concerning the appraisal, the fax stated: Mrs. Francisconi has arranged for an appraiser to inspect the premises. We need to arrange a time convenient with your client when he can do so." Second, concerning the copies of payments, the fax stated: "I am in the process of obtaining copies of payments (cancelled checks, telephonic transfers, wires, etc.) made by my client on the mortgage and also a list of payments received by Escrow Specialists." Third, with regard to

further settlement negotiations, the fax stated: "As soon as I have those in my possession", referring to the copies of payments, "I would like to schedule a meeting with you to go over the accounting on the payments, assuming you will have copies of cancelled checks, etc. from your client as well." Finally, concerning the parties intentions resulting from the December 22 conversations, the fax stated: "As I previously stated, it is our intention to arrive at an agreeable figure, . . ." (District Court File, pgs. 267 - 273, parag. 10)

Sometime just prior to January 14, 2005, Mr. Pettey received a document from Mr. Smay entitled ORDER. The ORDER had a post-it note on it which stated, "Please forward to the Court after signing & please fax us a copy of signature page." The ORDER consisted of two pages, and did not have a Certificate of Mailing attached. The ORDER proposed certain language and terms which were additional to, and even inconsistent with, the terms stated in the December 23, 2004 fax. The ORDER proposed certain terms which were not even discussed by the parties on December 22, 2004. (District Court File, pgs. 267 - 273, parag. 11)

Mr. Pettey believed that the ORDER was a proposed stipulation which was different than the parties previous discussions. Mr. Pettey did not believe that Mr. Smay would submit the ORDER to the Court for signing. The Court finds Mr. Pettey's belief reasonable, given that the ORDER delivered to Mr. Pettey did not have a certificate of mailing and had a post-it note indicating that it was Mr. Pettey's responsibility to sign the ORDER and submit the same. (District Court File, pgs. 267 - 273, parag. 12)

Mr. Pettey sent a fax to Mr. Smay on January 14, 2005, that disputed some of the terms stated in the ORDER, and requested that Mr. Smay change the ORDER. (District Court File, pgs. 267 - 273, parag. 13)

The ORDER was submitted to the District Court, with a certificate of mailing attached, and

was entered by the Court. (District Court File, pgs. 267 - 273, parag. 14)

The District Court found that the ORDER was entered without the appropriate notice to Plaintiff, and thus, the ORDER should be vacated. (District Court File, pgs. 267 - 273, parag. 15)

Subsequently, Mr. Pettey obtained an appraisal of the 1131 Electra Lane property, obtained copies of payments (cancelled checks, telephonic transfers, wires, etc.) made by my client on the mortgage, obtained a list of payments received by Escrow Specialists, and was ready to schedule a meeting with Mr. Smay to go over the accounting on the payments. Also, Mr. Pettey was also ready to meet with Mr. Smay to attempt to negotiate a resolution of the above-entitled matter. (District Court File, pgs. 267 - 273, parag. 16)

Plaintiff sent a settlement offer to Defendant on or about April 5, 2005. (District Court File, pgs. 267 - 273, parag. 17)

However, Defendant was not pleased with Plaintiff's offer of settlement, and decided to break off further settlement negotiations with Plaintiff. Thus, Defendant indicated that Defendant was rejecting Plaintiff's offer of settlement, and Defendant did not provide any counter offer of settlement. (District Court File, pgs. 267 - 273, parag. 18)

Sometime after the receipt and review of the April 5th settlement offer from Plaintiff, Defendant became uninterested in meeting with Plaintiff, exchanging payment information and appraisal information, and making any further efforts at settlement. Thus, Defendant did not ever provide Plaintiff with proof of the payments made by Defendant and the improvements made by Defendant. (District Court File, pgs. 267 - 273, parag. 19)

The District Court found that the parties did not come to a meeting of the minds on several essential terms and, therefore, did not come to any legally enforceable agreement, with regard to settlement of the above-entitled action. (District Court File, pgs. 267 - 273, parag. 20)

The District Court found that the parties did not come to any legally enforceable agreement, with regard to the home located at 1131 Electra Lane. (District Court File, pgs. 267 - 273, parag. 21)

The District Court found that settlement negotiations have broken down in the above-entitled case, and that each party should be entitled to pursue their legal remedies. (District Court File, pgs. 267 - 273, parag. 22)

D. Statement of Facts and Conclusions concerning the Eviction as established at trial held on January 3, 2007.

Plaintiff Sharlene Francisconi ("Francisconi") and Defendant Becky Hall ("Hall") are sisters. Sometime in late 2001 or early 2002, the parties decided that they would cooperate to obtain a home for Hall. The basics of the agreement were that Hall, who was not particularly credit-worthy because of multiple prior bankruptcies and vehicle repossessions, would provide a down payment of $30,000.00. Francisconi would use her credit-worthiness to finance the balance of the purchase price, but Hall would make the monthly payments due on the mortgage loan secured by Francisconi. The payments would be made through an escrow company to help re-establish Hall's credit. FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 1)

Pursuant to the parties' agreement, on or about February 8, 2002, Francisconi purchased a home located at 1131 E. Electra Lane, in Sandy, Utah, for a price of $121,500. After crediting the $30,000.00 down payment provided by Hall, the balance of the purchase price was financed through an Adjustable Rate Note (the "Note") on which Francisconi alone was obligated. (Appellant's Opening Brief, Exhibit E, FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 2)

On March 1, 2003, Francisconi and Hall memorialized their understanding in a Real Estate Contract (the "Contract") signed by the parties at the offices of 1st National Title Company (the "title company"). (Plaintiff's Trial Exhibit 2). In addition to the Contract, the parties signed a Quit Claim Deed, Trust Deed, Special Warranty Deed, and Escrow Agreements that same day at the offices of the title company. Steve Brantley, an escrow officer for the title company, met with the parties, explained the documents that each of the parties were signing and notarized the signed documents. FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 3)

4. Paragraph 4 of the Contract states:

> "**Price and Payment**.
>
> A. Buyer [Hall] agrees to pay for the Property the purchase price of Ninety-One Thousand, Five Hundred Dollars and 00/100 ($91,500.00), payable to Sharlene Francisconi, or to her order on the following terms:
>
> > The terms of the principal and interest portion of the payments mirror the terms of that certain Adjustable Rate Note, dated February 8, 2002, executed by Francisconi in favor od [*sic*] Ameriquest Mortgage Company, in the principle [*sic*] amount of $91,500.00, and with an initial interest rate of 8.65%. The amount of principal and interest owing under this Contract are identical to the amounts owing for each payment under the terms of the Note. Further, any changes in the interest rate, prepayment charges, or other obligations owing to Ameriquest Mortgage are incorporated herein by reference. However, the payment is due on the first day of each month, and late after the FIFTH day of each month, with a 6.0% late fee owing after the fifth day of each month (rather than the fifteenth day as set forth in the Note)."

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 4)

The Ameriquest Mortgage, referred to in paragraph 4 of the Contract, is the Note offered into evidence as Plaintiff's Trial Exhibit 1. (FINDINGS OF FACT AND CONCLUSIONS

OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 5)

Paragraph 22 of the Contract contains an integration clause that specifically names certain contemporaneously executed documents that together form the parties' complete agreement: (a) the Contract (Plaintiff's Trial Exhibit 2), (b) the Escrow Agreement for Funds Held (Plaintiff's Trial Exhibit 3), (c) the Supplemental Escrow Instructions, (Plaintiff's Trial Exhibit 4), (d) the Quit-Claim Deed, (Plaintiff's Trial Exhibit 6). (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 6)

Included among the documents forming the integrated Contract are two Escrow Agreements by which Hall agreed to deposit $5,000.00 for the benefit of Francisconi in the event Hall failed to make monthly payments each month to cover the mortgage obligation. The escrowed funds would be "available for demand to be paid to any amounts due and owing with respect to the property." Plaintiff's Ex. 3 ("Escrow Agreement"); Plaintiff's Trial Exhibit 4 ("Supplemental Escrow Instructions"). (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 7)

The express terms of the Escrow Agreement provide that Francisconi had the discretion (but not the obligation) to demand that payments be made from the escrowed amount upon notification that Hall had not made her payments as scheduled by the 5th of the month. See Paragraph 4 ("Sharlene may then demand, in writing, that an amount of the escrowed funds . . . be released"); *see also* Paragraph 6 ("If Francisconi requests or demands advances to pay any sums owing for payments . . ." (emphasis added). (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 8)

Hall initially made her payments under the Contract on a regular basis. However, at various times between June 2002 and June 2004 Hall failed to make a number of payments under the Contract. Specifically, Ex. 8 at page 2 itemizes payments which Hall failed to make. At trial, Hall did not dispute these specific claims by Francisconi. Therefore, the District Court accepts these claims as having established by the evidence. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 9)

Consistent with the parties' intent as reflected in the Contract and accompanying Escrow Agreement, the missed payments were made up by drawing from the escrowed $5,000.00. Based on the testimony and exhibits introduced at trial, the District Court finds that the money in escrow was depleted by June 2004. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 10)

Because of the adjustable nature of the Note, by late 2003, the monthly payment under the Note had increased to $940.67. Hall testified that at various times she tried to get certain friends qualified to purchase the home, or arrange for her own financing. The parties disagree on why those efforts were unsuccessful. Hall asserts it is because Francisconi would not cooperate. Hall, however, presented no evidence establishing that Hall's financial circumstances, in fact, would have qualified her to refinance the home on her own. Although there was some conflicting evidence at trial, the District Court credits Francisconi's testimony that Hall, who was facing health problems, wanted to lower her monthly payment on the house. The parties differ on whether or not Francisconi informed Hall of the timing of Francisconi's refinancing efforts, but the District Court finds that dispute is not material to the decision herein. The fact is that Francisconi was able to refinance the

home and thereby accomplish Hall's stated goal, which was to lower her monthly payment on the house. The refinance was completed in December, 2003 and lowered the monthly payment for which Hall was responsible to $716.50 per month. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 11)

In connection with, or shortly after, the refinance, Francisconi also secured a line of credit using the equity interest in the Electra home. As a result, a second mortgage lien was placed on the property. The parties dispute whether or not Francisconi disclosed this second lien on the property to Hall. Francisconi used the money from the line of credit to make other real estate investments in February 2004. Hall was never responsible for any payments on the line of credit; those payments were solely Francisconi's responsibility. Francisconi retired that debt in full sometime in the Fall, 2004. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 12)

Hall made two payments in–February and March 2004–at the lower monthly rate. Thereafter, Hall stopped making payments altogether. She never made or tendered another payment owing under the Contract. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 13)

Based on the District Court's review of the exhibits submitted at trial, the District Court finds that as of June 28, 2004, at least the following payments were past due:

A. June 2002 payment of $858.02

B. March 11, 2003 "garbage assessment" fee of $165.29

C. November, 2003 payment of $940.67

D. April, 2004 payment of $719.15

E. May, 2004 payment of $718.88

F. June, 2004 payment of $748.06

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 14)

Paragraph 14 of the Contract provides as follows:

> **Buyer's Default**. Should buyer fail to comply with any of the terms hereof, Seller may, in addition to any other remedies afforded the Seller in this contact or by law, elect any of the following remedies:
>
> A. Seller shall give Buyer written notice specifically stating: (1) The Buyer's default(s); (2) that buyer shall have twenty (20) days from her receipt of such written notice within which to cure the default(s), which cure shall include payments of Seller's costs and reasonable attorney's fees; and (3) Seller's intent to elect this remedy if the Buyer does not cure the default(s) within the twenty (20) days.
>
> Should Buyer fail to cure such default(s) within the twenty (20) days, then Seller shall give to Buyer another written notice informing Buyer of his failure to cure the default(s) and of the Seller's election of this remedy. Immediately upon Buyer's receipt of this second written notice, Seller shall be released from all obligations at law and equity to convey the Property to Buyer, and Buyer shall become at once a tenant-at-will of Seller. All payments which have been made by Buyer prior thereto under this contract shall, subject to then existing law and equity, be retained by Seller as liquidated and agreed damages for breach of this contract.

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 16)

On June 30, 2004, Hall was personally served a Notice which stated:

> Pursuant to paragraph 14a of the Contract, you are hereby given the required 20-day notice to bring all sums current. In order to bring the terms of the contract into compliance, it is necessary for you to pay the sum of $4,972.22, plus the amount necessary to serve this notice upon you, on or before the 20th day following

service of this Notice upon you.

The Notice further stated:

> In the event that you do not pay the necessary amount on or before the 20th day following the date of service of this document upon you, then your interest in and to the property referenced above will be forfeited and you will be considered a tenant at will and you will be subject to eviction.

Hall did not tender or attempt any payment to Francisconi after receiving the Notice. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 17, 18)

On August 9, 2004, Defendant Hall was personally served with a Notice which stated:

> Please be advised that more than twenty days have elapsed since demand was made upon you to bring current all sums owing to Sharlene Francisconi. That demand has not been satisfied, and pursuant to the terms of paragraph 14 of the contract, you are hereby notified that any interest you may have had in the property is now forfeited.
>
> You are considered a tenant at will, and pursuant to the terms of Utah Law, this demand is for you to remove yourself and your possessions with FIVE (5) days of service of this Notice and Demand upon you.
>
> If you have not removed yourself and your possession within FIVE (5) days of service of this Notice upon you, and action to have you evicted may be commenced, and you may be found liable for any and all legal fees necessary to enforce the terms of the contract, as well as TREBLE damages for any period of holdover tenancy. In addition, a judgment may be taken against you for such damages, and you non-exempt personal property may be seized and sold and funds applied to any judgment granted.

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 19)

At trial, Hall argued that Francisconi's second mortgage line of credit obtained in

December 2003 breached the Contract and excused her from making any payments due on the Contract. Paragraph 9 of the Contract provides as follows:

> Covenant against liens. Except for the liens and encumbrances set forth above, Seller [Francisconi] covenants to keep the Property free and clear of liens and encumbrances arising from acts of Seller. So long as Buyer [Hall] is current hereunder. Seller agrees to keep current the payments on all obligations to which Buyer's interest is subordinate. Should Seller default on the foregoing covenants on any one or more occasions, Buyer may, at Buyer's option, in whole or in part, make good Seller's default to Seller's obligee and deduct all expenditures so paid from future payments to Seller and Seller shall credit all buyer's sums so expended to the indebtedness herein created just as if payment had been made directly to Seller under provisions of Section 4 above.

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 20)

The District Court accepts Francisconi's uncontradicted testimony that she had the present ability at any point in 2004 to pay off the home equity line of credit. The District Court finds that if Hall had been able to secure alternative financing to cover the mortgage, Francisconi would have been able to meet her obligation to deliver a Warranty Deed to Hall as required by paragraph 7(B) of Contract, which provides as follows:

> Refinancing/Pay-Out. In the event Buyer pays or obtains a new loan refinancing the underlying obligation, the Buyer shall be entitled to the delivery of a Warranty Deed executed by Seller wherein the Buyer is Grantee; provided, however, if any portion of the Seller's equity remains unpaid, then the following conditions precedent shall have been satisfied: (1) Buyer is not then in default under any of the terms of this Contract; (2) the principal amount of the new loan may exceed the balance of the underlying obligation being refinanced only if all loan proceeds which exceed the unpaid balance of the underlying obligation are paid to the Seller as a credit against the unpaid balance of the Seller's Equity in this Contract; and (3) Buyer shall have executed and delivered to Seller an executed Trust Deed Note in the form, amount, and with the terms of the Trust Deed note described in paragraph 7(A)(3) above. Such note shall be subordinate only to the Trust Deed securing the new loan and any remaining Trust Deed

securing the underlying obligation which have not been reconveyed.

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 21)

However, the District Court finds that at no point from March 2002 until her eviction in June 2006 did Hall ever have the financial ability to secure financing on her own for the Electra Lane home. Neither was she ever able to put forward a surrogate who could qualify to assume the loan on the Electra Lane home. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 22)

Further, in late November, 2003, Hall was in default in the payment terms of the Contract, and would have had to bring those payments current before being able to exercise her right under the Contract to refinance the property and secure a pay-off. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 23)

After receiving the Notice on August 9, 2004, Defendant Hall did not remove herself from the premises. Rather, Hall remained in possession of the 1131 Electra Lane home until June 14, 2006. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 24)

On October 22, 2004, the above-entitled action was filed. Hall was served with a Three Day Summons and Complaint for Unlawful Detainer on October 26, 2004. After extended pre-trial proceedings Hall was eventually evicted on June 14, 2006 on the basis of a Writ of Restitution signed by this District Court. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 25)

Francisconi testified as to her belief of the fair rental value of the Electra Lane

property. According to Francisconi's testimony, she believed the rental value during 2002 was $1,000.00 per month; that it climbed to $1,200.00 per month in 2005, and climbed again to $1,400.00 per month 2006. While Francisconi testified she had experience in real estate and rental properties, she was not expressly qualified as an expert in that area, and the District Court finds some of that testimony to be contradicted by other facts in evidence. For example, both Francisconi and Hall testified that when Hall moved out, the home "could not be rented out in its current state." Although no testimony was specifically elicited regarding the nature of repairs that would need to be made before the home was fit for re-rental or sale, it seems clear that Francisconi's estimate of a $1,400.00 per month fair rental value in 2006 may be inflated given the condition of this home, even if rents in neighboring areas might have been higher. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 26)

Based on the testimony and evidence presented at trial, the District Court accepts Francisconi's initial determination of the property's monthly fair rental value for 2002 as being $1,000.00 per month. For the reasons stated below, the District Court also finds that the $1,200.00 per month estimate for 2005 is also fair and reasonable, and therefore adopts it. However, the District Court rejects Francisconi's further estimate that the fair rental value of the Electra Lane home as $1,400.00 in 2006. Instead, the District Court continues the $1,200.00 per month amount as the fair rental value throughout the rest of the term of Hall's occupancy. The District Court arrives at this based on the evidence presented at trial. Starting first with the fact that the initial mortgage payments on the home were set at $858.02 per month, and during the course of Hall's occupancy ranged from a high of $940.67 to a low of $716.50 per month. Additional testimony established that

at different times Hall had renters living with her at the home, and that from renters she received amounts ranging from $300 to $900 per month. Averaging the documented monthly mortgage costs, and adding the lowest amount paid by renters, the District Court finds that the monthly rental value of $1,200.00 as estimated by Francisconi is not excessive. Accordingly, the District Court finds that this is an appropriate rental value on which to compute statutory damages under the unlawful detainer statute. No evidence was presented at trial in support of claims for additional damage. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 27)

The District Court concludes that the Contract signed by the parties on March 1, 2002 was a legal and binding agreement, and together with the documents referenced therein, constituted the final expression of the parties' agreement concerning the real property located at 1131 E. Electra Lane. The District Court expressly rejects Hall's characterization of the Contract as "fundamentally unenforceable, as lacking consideration . . " Defendant's Trial Memo, at 2. *See also* id. (arguing that the Contract was "entirely without consideration given by [Francisconi], or was based upon a consideration which was wholly illusory"). Hall's consideration for the Contract was the $30,000.00 down payment. Francisconi's consideration for the Contract was the use of her credit, worthiness to secure a mortgage, something Hall was unable to do on her own. In the process of securing a mortgage for the property, Francisconi became legally bound to repay the Note in the amount of $91,500.00. This is more than adequate consideration to support the Contract. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 28)

The District Court further reject's Defendant's characterization of the Contract as a "contract of adhesion, or an outright fraud." Id. The District Court has closely reviewed the terms of the Contract and adjunct agreements that together comprise the integrated agreement. To be sure, this land-sale Contract principally protects Francisconi, not an unusual circumstance in a "sub-prime" situation where the owner of the real estate is financing the sale of the property to a marginally qualified buyer. However, that, by itself, does not make the Contract unconscionable or unenforceable. Francisconi could reasonably have charged Hall some premium for the use of her credit and required Hall's monthly payments to include some small percentage above the amount Francisconi was obligated to pay under the Note. This she did not do. The terms of the Contract mirrored exactly the terms of the Note. In short, had Hall timely performed her obligations under the Contract, she would have acquired the property for exactly the amount that Francisconi committed to pay for it. This is hardly an unconscionable agreement. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 29)

The District Court also rejects Hall's argument that by encumbering the property through a second mortgage line of credit, Francisconi anticipatorily breached the Contract by failing to deliver a Warranty Deed to Hall. Hall argues that Francisconi's alleged breach excused her performance under the Contract. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 30)

While the District Court concludes that Francisconi's encumbrance of the Electra Lane home with a second mortgage line of credit in December 2003 violated the provisions of Paragraph 9 of the Contract, the Contract itself anticipated that possibility and provided the remedy in the event

it occurred. Specifically, Paragraph 9 of the Contract provides that:

> [s]hould Seller [Francisconi] default on the foregoing covenants [referring to the covenant against liens] on any one or more occasions, Buyer [Hall] may, at Buyer's option, in whole or in part, make good Seller's default to Seller's obligee and deduct all expenditures so paid from future payments to Seller, and Seller shall credit all buyer's sums so expended to the indebtedness herein created just as if payment had been made directly to Seller under provisions of [the Contract].

(FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 31)

The District Court concludes that Hall was not excused from making the monthly payments due under the Contract because of the second mortgage line of credit placed on 1131 Electra Lane home by Francisconi in December 2003. Hall never exercised the remedy the parties bargained for in their Contract. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 32)

Moreover, the District Court concludes that Hall's duty to obtain a new loan refinancing the underlying obligation was a condition precedent that had to be performed by Hall in order to create a duty in Francisconi to deliver a Warranty Deed to Hall. Since Hall never obtained a new loan refinancing the underlying obligation, she was never entitled to delivery of the Warranty Deed. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 33)

By late November, 2003, Hall was in default under the terms of the Contract, in that she had not made the June, 2002 payment, the Garbage Assessment due March,2003, and the November, 2003 payment. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 34)

On June 30, 2004, Plaintiff gave written notice to Defendant that the Defendant was in default. Pursuant to paragraph 14a of the Contract, Plaintiff gave Defendant twenty (20) days as stated in the Notice. In fact, Defendant had until August 9th, when Defendant was served with a second Notice to cure the default. The District Court concludes that the time given to Defendant to cure the default was reasonable. See Johnson v. Austin, 748 P.2d 1084, 1086 (Utah1988). (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 35)

Pursuant to Utah Code Section 78-36-3, and the delivery of the Notice on August 9, 2004, Defendant Hall was a tenant at will, and had the duty to remove herself from the premises located at 1131 E. Electra Lane, on or before August 14, 2004. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 36)

As such, Francisconi was entitled to possession of the premises located at 1131 E. Electra Lane, commencing on August 15, 2004. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 37)

Defendant Hall unlawful detained the premises located at 1131 E. Electra Lane, in Sandy, Utah, from August 15, 2004, until her final removal on June 14, 2006. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 38).

Pursuant to Utah Code Section 78-36-10, Plaintiff Francisconi is entitled to judgment declaring the forfeiture of the Contract. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 39)

Pursuant to Utah Code Section 78-36-10, Plaintiff is entitled to damages resulting from the unlawful detainer of the premises. Pursuant to Utah Code Section 78-36-10(3) judgment should enter against Defendant in the amount of the rental value of the property, for three times the amount of damages assessed under subsection (2), and for reasonable attorney's fees. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 40)

Thus, the District Court awards statutory damages in the amount of $500.00 for August, and $1,000.00 for September, October, November, December, 2004, times three, for a total of **$13,500.00** for **2004**. Additionally, the District Court awards damages in the amount of $1,200.00 for each month in 2005, trebled, for a total of **$43,200.00**. Finally, the District Court awards damages in the amount of $1,200.00 for the months of January, February, March, April, May, of 2006, plus $700.00 for June, trebled, for a **2006** total of **$20,100.00. Therefore, the total statutory damage award is $76,800.00**. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 41)

The District Court rejects Francisconi's argument that under the terms of the Contract, she is also entitled to keep the $30,000.00 which Hall contributed as down payment on the property. The Contract explicitly provide that Seller covenanted to sell the property to Buyer for $91,500.00. The undisputed evidence at trial was that the property actually cost $121,500.00 to purchase. Thus, it is clear that Hall's $30,000.00 contribution was credited against the overall cost of the property before the parties entered into the Contract. Thus, while Hall's subsequent default under the Contract led her to forfeit all monies paid under the Contract, it did not result in Hall forfeiting her equitable

interest to the extent of her $30,000.00 contribution. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 42)

The District Court has carefully reviewed Hall's post-trail memorandum and the case law she submitted in support of Hall's argument that by virtue of her $30,000.00 payment she was a legal co-tenant with Francisconi on the property and therefore could not be evicted from the property, even after she failed to comply with the terms of the Contract. Defendant's Post-Trial Memorandum, at 8, 9. The District Court rejects this argument. At no time was Hall officially a tenant-in-common with Francisconi on the property. Although Hall's money was used for the down payment, she did not obligate herself on the mortgage Note, and her credit (or lack thereof) apparently was not considered in securing the mortgage. No evidence was presented at trial that Hall signed any documents associated with the purchase of the Electra Lane property from a third-party seller. The District Court concludes that the parties intended and agreed that Francisconi would be the sole purchaser and owner of the property and, thereafter, Hall would purchase the property-at Francisconi's cost-by complying with the terms of the Contract. To be sure, Hall immediately acquired a substantial equitable interest in the property by virtue of the $30,000.00 of her money that was paid in connection with that original purchase of the home. Utah courts recognize that buyers acquiring real property through land-sale contracts acquire "equitable title" to the property. However, in order to protect the seller from potential default by a buyer, the courts also recognize that the seller alone retains the "legal title" until the terms of the land-sale contract are fulfilled. See Butler v. Wilkinson, 740 P.2d 1244, 1255 (Utah 1987) . The District Court concludes, as a matter of law, that Hall's equitable interest in the Electra Lane home did not amount to a legal co-tenancy with

Francisconi. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 43)

Based on the preceding analysis the District Court concludes that in consideration of Hall's equitable interest in the property, she should receive an offset in the amount of $30,000.00 against the judgment to be entered against her. See e.g., Butler v. Wilkinson, 740 P.2d at 1254 (recognizing that judgments liens can attach to equitable real estate interests created pursuant to land sale contracts). However, because Hall defaulted in her obligations under the Contract, the District Court further holds that she is not entitled to further credit to account for any appreciated value of the property, if any Cf. Id. At 1256 (concluding that a vendee under a land-sale contract is entitled to the appreciated value of the property over the contract purchase price as long as [the vendee's] interest has not been forfeited). (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 44)

As the prevailing party in this case, and pursuant to the Contract terms and Utah Code Section 78-36-10(3), the District Court awards Francisconi the reasonable attorney's fees requested in the Affidavit of Gregory M. Constantino submitted at trial, plus the subsequent Affidavit(s) of Gregory M. Constantino establishing the reasonable attorney's fees incurred by Plaintiff on January 3, 2007, and thereafter in this matter. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 45)

The District Court also awards the Plaintiff her court costs as established by a memorandum of costs filed with the District Court. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 46)

Finally, the District Court orders that the possession bond paid into the District Court by Francisconi be released to her or her agent. (FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007, parag. 47)

SUMMARY OF THE ARGUMENT

First, the Appellant's issues on appeal were not the issues decided by the District Court. For instance, Appellant asserts in her issues on appeal, that the following issue was decided by the District Court and is now properly on appeal.

> "Whether an order setting aside a judgment, which neither recites the provision of Rule 60(b) under which it is granted nor finds that the request to set aside was filed within a reasonable time, can be sustained?"

The District Court did not recite the provision of Rule 60(b) under which the Motion to Set Aside the Order was granted, because the District Court set aside the order pursuant to Rule 54(b) and the rationale articulated in Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994).

The Appellant's Opening Brief mis-represents the issues before the District Court, the District Court's decisions and the legal basis the District Court put forward for those decisions. As a result, the Appellant does not adequately provide a legal analysis and the issues raised by Appellant are inadequately briefed.

The District Court did not abuse its discretion in setting aside the Order entered on January 19, 2005, and the District Court's decision should be affirmed.

The District Court did not abuse its discretion is denying Defendant/Appellant's Motion to

File an Amended Answer and Counter-claim, where the underlying case was for unlawful detainer, and Defendant/Appellant, after causing the proceedings to be delayed for over eighteen (18) months, then moved the Court to file the Amended Answer and Counter-claim. Kelly v. Hard Money Funding, Inc. 87 P.3d 734, 742 (Utah App. 2004).

Finally, Appellant BECKY HALL entered into a REAL ESTATE CONTRACT (District Court File, pgs. 211 - 219) which was properly enforced by the District Court. The District Court properly found that BECKY HALL was in breach of the contract, as she stopped making the required payments in March, 2004. Further, the REAL ESTATE CONTRACT had an enforceable forfeiture clause. Plaintiff/Appellee properly followed the notice of default provisions in the REAL ESTATE CONTRACT, and Defendant/Appellant did not cure her default even after she was given a reasonable time to do so. After BECKY HALL'S interest in the Real Property was forfeited, Appellant BECKY HALL became a tenant at will and Appellant BECKY HALL was properly evicted from the premises.

Thus, the Judgment and Order of the District Court, entered on May 2, 2007, should be affirmed. (District Court File, pgs. 746- 748)

ARGUMENT

POINT I. THE ISSUES REGARDING THE SET ASIDE OF THE ORDER ENTERED ON JANUARY 19, 2005, ON APPEAL HAVE BEEN INADEQUATELY BRIEFED.

Appellant has not complied with appellate rule governing briefs, because Appellant's brief fails to set forth coherent statement of issues and appropriate standard of review for each issue with supporting authority. Further, Appellant's Statement of the Case does not provide statement of relevant facts properly documented by citations to record. Thus, the District Court final decision should be affirmed.

Appellant claims that the first issue on appeal is "whether a judgment or order may be set aside other than under Rule 60(b) . . ." (Appellant's Opening Brief, pg. 5). Appellant asserts that her next issue on Appeal is "whether an order setting aside a judgement, which neither recites the provision of Rule 60(b) under which it is granted nor finds that the request to set aside was filed within a reasonable time, can be sustained." (Appellant's Opening Brief, pg. 5).

Both of these statements are either false or misleading as to what the District Court actually did, and Appellant does not cite to the record regarding either statement which ascribes a certain behavior to the District Court.

In fact, what happened was that the District Court held a hearing on Plaintiff/Appellant's Motion on October 28, 2005. (District Court File, pgs. 184 - 185). At that hearing, the District Court determined that the Motion to Set Aside Order and Motion to Allow the Parties to Resume Litigation is essentially a Motion to Enforce (or not) an alleged settlement agreement. (District Court File, pgs. 184 - 185). The District Court further determined that an evidentiary hearing was necessary to make the determination, and set the evidentiary hearing for December 19, 2005. (District Court File, pgs. 184 - 188). Further, that the Court filed a written memorandum and stated:

> "Defendant Hall objected to this evidentiary hearing based on the argument that the Motion fails to comply with Utah R. Civ. P. 60(b). The court rejects this argument. Utah R. Civ. P

54(b) expressly allows a court to revise a non-final order "at any time before the entry of judgment . . ." See Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994)(Motion for reconsideration procedurally proper under Rule 54(b) even though counsel had brought the motion pursuant to Rule 60(b))."
(District Court File, pgs. 184 - 185).

Then, a half-day evidentiary hearing was held on December 19, 2005. Subsequently ,the District Court entered Findings of Fact and Conclusion of Law. (District Court File, pgs. 267 - 273) Appellant does not cite to the facts found by the District Court or the District Court's conclusions of law or the subsequent Order entered by the Court. (Appellant's Opening Brief, pgs. 6 - 8) Appellant does not put forward the District Court's rationale in making its decision, and then Appellant does not provide case law that supports Appellant's position. (Appellant's Opening Brief)

Rather, Appellant makes misstatements about what the District Court actually did. For instance, Appellant's brief states: " . . . Judge Himonas presumes that under subdivisions (4), (5) and (6) of the Rule any amount of time may be taken, without explanation." (Appellant's Opening Brief, pg. 17)

This represents inadequate briefing of this issue. While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court ." State v. Thomas, 961 P.2d 299, 305 (Utah 1998). If Appellant has not substantially complied with appellate rule governing briefs, has not provided statement of relevant facts properly documented by citations to record, has not accurately identified

the actual decisions of the trial court, the Trial Court's decision should be affirmed. State v. Price, 827 P.2d 247, 249 (Utah App. 1992).

The Court of Appeal has routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record. See Trees v. Lewis, 738 P.2d 612, 61213 (Utah 1987) (Court dismisses appeal because appellant has not supported the facts set forth in his brief with citations to the record" as required by the Utah Rules of Appellate Procedure); State v. Garza, 820 P.2d 937, 939 (Utah App.1991) (court refuses to reach an issue because defendant failed to include a statement of facts in her brief, as required by Rule 24(a)(7)"); Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184 (Utah App.1987) (If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below.").

As such, the Court should affirm the decision of the District Court reflected in the Findings of Fact and Conclusions of Law, and Order on Hearing of December 19, 2005 and the decision reflect in the final Judgment and Order. (District Court File 266 - 277 and 746 - 748)

POINT II: APPELLANT HAS NOT OBTAINED A TRANSCRIPT OF THE EVIDENTIARY HEARING HELD ON DECEMBER 19, 2005, AND HAS FAILED TO MARSHALL THE EVIDENCE. THUS, APPELLANT MAY NOT NOW ATTACK THE FINDINGS OF FACT ENTERED IN THIS CASE.

To successfully attack findings of fact, appellant must first marshal all the evidence

supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings. Doelle v. Bradley, 784 P.2d 1176 (Utah1989). Appellant has burden of providing Court of Appeals with adequate record to preserve its arguments for review, and must also marshal all evidence that supports findings and demonstrates that, despite such evidence, findings are so lacking in support as to be against clear weight of evidence and thus clearly erroneous. Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah App.1990).

Defendant/Appellant's failure to provide Court of Appeals with transcript of the District Court proceedings make it so that the Court of Appeal is unable to review evidence, and thus, the Court of Appeal is unable to ascertain whether trial court's findings were based upon sufficient evidence. As such, the Court of Appeals must accept the District Court's factual findings. (District Court File 266 - 273, and FINDINGS OF FACT AND CONCLUSIONS OF LAW, JUDGMENT and ORDER entered on April 3, 2007).

POINT III: THE TRIAL COURT PROPERLY APPLIED RULE 54 OF THE UTAH RULES OF CIVIL PROCEDURE IN SETTING ASIDE THE ORDER ENTERED ON JANUARY 19, 2005.

Standard of Review: The decision to entertain a motion under Rule 54(b) is a question of law. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994). The Court of Appeal accords conclusions of law no particular deference, but reviews them for correctness.' "

Richins v. Delbert Chipman & Sons Co., 817 P.2d 382, 385 (Utah App.1991) (quoting Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)). It is within the sound discretion of the trial court to grant a motion under Rule 54(b), and the decision to do so will not be disturbed on appeal absent an abuse of this discretion. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1312 (Utah Ct. App. 1994).

Rule 54(b) of the Utah Rules of Civil Procedure, however, allows a court to change its position with respect to any order or decision before a final judgment has been rendered in the case. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994)(*citing* Timm v. Dewsnup, 851 P.2d 1178, 1184-85 (Utah 1993); *and* Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 4445 (Utah App.1988)).

Because the substance, not caption, of a motion is dispositive in determining the character of the motion, the Trial Court may treat Plaintif/Appellee Motion made pursuant to Rule 60(b) as a Rule 54(b) motion. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1310 (Utah Ct. App. 1994). Rule 54(b) of the Utah Rules of Civil Procedure provides, in pertinent part, that any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Id. at 1310-11.

A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice"will result if the court does not reconsider the prior

ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court. Id. at 1311.

In this instance, counsel for Plaintiff received the ORDER without a signed certificate of mailing and with a post-it note stating: "Please forward to the Court after signing & please fax us a copy of signature page." The ORDER proposed certain language and terms which were additional to, and even inconsistent with, the terms stated on the record. (District Court File, pgs. 267 - 273, parag. 11)

Further, counsel for Plaintiff/Appellee believed that the ORDER was a proposed stipulation which was different than the parties previous discussions. Counsel for Plaintiff did not believe that counsel for Defendant would submit the ORDER to the Court for signing, and the District Court found that that belief was reasonable. (District Court File, pgs. 267 - 273, parag. 12)

Additionally, the District Court found that the ORDER was entered without the appropriate notice to Plaintiff. (District Court File, pgs. 267 - 273, parag. 15)

Finally, the Order which was set aside was supposedly based on an agreement reached between the parties, but the District Court found that the parties did not come to a meeting of the minds on several essential terms and, therefore, did not come to any legally enforceable agreement, with regard to settlement of the above-entitled action. (District Court File, pgs. 267 - 273, parag. 20)

Certainly, given the above stated facts, this court should not conclude that Judge Deno Himonas abused his discretion by granting Plaintiff/Appellee's motion to set aside the Order.

POINT IV: THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION IN DENYING DEFENDANT BECKY HALL'S MOTION TO FILE AMENDED ANSWER AND COUNTER-CLAIM.

Standard of Review: Appellant must show that the trial court clearly abused its discretion in denying BECKY HALL'S motion for leave to amend her answer and file the proposed Counter-Claim. Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994).

The District Court is found in District File, pages 468 - 471. The District Court ruling relies on Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1216 (Utah Ct. App. 1989), and Kelly v. Hard Money Funding, Inc. 87 P.3d 734 (Utah App. 2004)

Rule 15(a) of the Utah Rules of Civil Procedure states that, after the responsive pleadings have been filed, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Utah R Civ P 15(a)* In analyzing the grant or denial of a motion to amend, Utah courts have focused on three factors: the timeliness of the motion; the justification given by the movant for the delay; and the resulting prejudice to the responding party. Kelly v. Hard Money Funding, Inc. 87 P.3d 734, 742 (Utah App. 2004).

First, the Motion to Amend was untimely. The case was commenced as an eviction case, and it was commenced on October 22, 2004. Defendant filed an Answer on October 28, 2004. Then, the case was delayed because of the actions taken by Defendant. Defendant filed an Order which was not properly served on opposing counsel and did not reflect the parties stipulation placed on the

record. Defendant then defended these inappropriate actions and thus, cause delay. (District Court File, pgs. 267 - 273) Defendant actively avoided service of the Notice to Occupant's of Setting and Payment of Bond and Plaintiff was required to file a Motion for Alternative Service. (District Court File, pgs. 283 - 297) Defendant further caused delay by Petitioning for Extraordinary Writ/Petition for Emergency Relief, which did not meet the requirements for Extraordinary Writ, but did cause delay to the proceedings. (District Court File, pgs. 337, 358 - 362) Then, on June 13, 2006, over a year and half into an eviction proceeding, Defendant moves the court for leave to file the Amended Answer and Counter-claim. (District Court File, pgs. 372 - 383)

The Court did not abuse its discretion in denying Defendant/Appellant's Motion for Leave to File Amended Answer and Counter-claim.

POINT V: THE CONTRACT AND EVICTION ISSUES HAVE BEEN INADEQUATELY BRIEFED.

In the Issues on Appeal section of Appellant's brief, Appellant asserts that the following issues are on appeal.

"5. Whether a "remedy" described by the contact as "at the option of" a party is exclusive, such that failure to exercise it waives a preliminary breach; if not, whether appellee's preliminary breach excused further performance of appellant?

6. Whether appellant could be properly evicted from the subject realty?

7. Whether an agreement construed to permit one party, by preliminary breach, to force

the other into non-compliance, then claim the non-compliance as a breach, is not unconscionable and unenforceable? " (Appellant's Opening Brief, pg. 6)

Counsel for Appellee has reviewed the record in an effort to determine where the above-described issues were raised by Defendant and decided by the Court. This process has been made more difficult by the fact that Appellant has not cited to the record as to where these issues were decided by the Court. It is appellee's contention that the above-described issues, at least as stated by Appellant, were never reviewed by the Court. The issues as stated by Appellant misstate the facts, misstate the record, and misstate the real issues before the District Court.

Appellant has not appropriately cited to the record as to where issues number 5, 6, and 7 are in the record. As such, Appellant's issues on appeal, numbers 5, 6, and 7, are not reviewable by the Court of Appeal. This Court cannot, for first time on appeal, decide issues not noticed below in order to permit a party to assert a legal theory not presented to the trial court. See Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 455 (Utah App.1988)(*citing* Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 657 (Utah1988).

If issues number 5, 6, and 7 were raised, somewhere in the District Court record, the fact that Appellant has not cited to the place where the issues were raised, means the Court of Appeal should not review the issues.

While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing

court ." State v. Thomas, 961 P.2d 299, 305 (Utah 1998). If Appellant has not substantially complied with appellate rule governing briefs, has not provided statement of relevant facts properly documented by citations to record, has not accurately identified the actual decisions of the trial court, the Trial Court's decision should be affirmed. State v. Price, 827 P.2d 247, 249 (Utah App. 1992).

The Court of Appeal has routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record. See Trees v. Lewis, 738 P.2d 612, 61213 (Utah 1987) (court dismisses appeal because appellant has not supported the facts set forth in his brief with citations to the record" as required by the Utah Rules of Appellate Procedure); State v. Garza, 820 P.2d 937, 939 (Utah App.1991) (court refuses to reach an issue because defendant failed to include a statement of facts in her brief, as required by Rule 24(a)(7)"); Koulis v. Standard Oil Co. of California, 746 P.2d 1182, 1184 (Utah App.1987) (If a party fails to make a concise statement of the facts and citation of the pages in the record where those facts are supported, the court will assume the correctness of the judgment below.").

As such, the Court should affirm the decision of the District Court reflected in the Findings of Fact, Conclusions of Law, Judgment and Order. (District Court File 266 - 277 and 746 - 748)

POINT VI: THE TRIAL COURT CORRECTLY CONCLUDED THE PARTIES ENTERED INTO THE REAL ESTATE CONTRACT, WHICH WAS A LEGALLY ENFORCEABLE AGREEMENT.

A. The parties signed a Real Estate Purchase Agreement which was breached by Defendant/Appellant.

Standard of Review: On appeal from a bench trial, appellate court views evidence in a light most favorable to the trial court's findings, and recites facts consistent with that standard. Johnson v. Higley, 989 P.2d 61, 72 (Utah App. 1999). Whether contract exists between parties is a question of law which is reviewed under correction of error standard. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992). Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's interpretation no presumption of correctness. Lee v. Barnes, 977 P.2d 550, 552 (Utah App.1999).

If an agreement is unambiguous, the court must "determine the parties' intentions from the plain meaning of the contractual language as a matter of law. Green River Canal Co. v. Thayn, 84 P.3d 1134, 1141 (Utah 2003). It is Plaintiff's position that there is no ambiguity and the contract can be read, consistently, giving effect to all the language in the contract. Further, the Court should look first within the four corners of the agreement to determine the intentions of the parties, and should attempt to harmonize the provisions in the agreement. Central Florida Investiment, Inc. v. Parkwest Associates, 40 P.3d 599, 605 (Utah App. 2002).

In this instance, Defendant/Appellant BECKY HALL was required to make the payments due each month on the the first mortgage, on the home located at 1131 Electra Lane. BECKY HALL stopped making all payments toward the home and never made any payments after March, 2004. Thus, BECKY HALL was in default. The contract provisions had remedies for the Seller, SHARLENE FRANCISCONI which were followed by Plaintiff/Appellee. Thus, pursuant to the

terms of the contract, SHARLENE FRANCISCONI was entitled to declare the forfeiture of BECKY HALL'S right to purchase the 1131 Electra Lane property, and evict BECKY HALL from the property. (FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, parags. 2, 3, 14, 15, 16, 17, 18, 19, 20, 21, 28)

B. Enforcement of the Forfeiture Clause.

As a general rule in Utah, parties are free to contractually provide for an enforceable forfeiture provision, just like the one which is in paragraph 14 of the REAL ESTATE CONTRACT (See District Court File, pgs. 211 - 219) in this case. Adair v. Bracken, 745 P.2d 849, 852 (Utah App. 1987). In order to forfeit a purchaser's interest under a uniform real estate contract, the seller must comply strictly with the notice provisions of the contract. Id.

Forfeiture is a harsh remedy and a seller must give a buyer notice of default and a reasonable period of time in which to cure the default before exercising a forfeiture provision. Johnston v. Austin, 748 P.2d 1084, 1086 (Utah 1988). The rule relating to the refusal to apply a forfeiture, where that would produce a result so shocking to the conscience that a court of equity will not enforce it, has no application to the procedure for the foreclosure of a mortgage, which provides the mortgagor with the protections allowed by law in the foreclosure sale and the opportunity to redeem. Id.

In this case, Plaintiff/Appellee gave written notice to Defendant/Appellant on June 30, 2004 that the Defendant was in default. Pursuant to paragraph 14a of the contract, Plaintiff gave Defendant twenty (20) days as stated in the Notice. In fact, Defendant had until August 9th, when

Defendant was served with a second Notice to cure the default. Thus, the District Court concluded that Plaintiff complied with the contract requirements. Further, the District Court concluded that the time given to Defendant to cure the default was reasonable, and the District Court cited the case, Johnson v. Austin, 748 P.2d 1081, 1086 (Utah 1988). (See FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, parag. 35) Finally, the Court found and concluded the Defedant/Appellant did not cure the default or attempt to make any effort to cure the default. (FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, parags. 15, 16, 17, 18, 19, 20, 21, 22, 31, 32)

POINT VII: THE TRIAL COURT CORRECTLY CONCLUDED THAT BECKY HALL WAS IN BREACH OF SAID REAL ESTATE CONTRACT, AND, AS SUCH, PLAINTIFF WAS ENTITLED TO A DECLARATION OF FORFEITURE PURSUANT TO UTAH CODE SECTION 78-36-10.

Standard of Review: On appeal from a bench trial, appellate court views evidence in a light most favorable to the trial court's findings, and recites facts consistent with that standard. Johnson v. Higley, 989 P.2d 61, 72 (Utah App. 1999). Whether contract exists between parties is a question of law which is reviewed under correction of error standard. Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 583 (Utah App. 1992). Questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions we accord the trial court's

interpretation no presumption of correctness. Lee v. Barnes, 977 P.2d 550, 552 (Utah App.1999).

A. Declaration of Unlawful Detainer and Forfeiture of the Defendant's rights pursuant to the Real Estate Contract.

Utah Code Section 78-36-3 provides:

"(1) A tenant of real property, for a term less then life, is guilty of an unlawful detainer:

. . .

(b)(ii) in case of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five days;

. . .

(e) when he continues in possession in person or by subtenant after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned."

As such, Plaintiff/Appellee SHARLENE FRANCISCONI was entitled to possession of the premises located at 1131 Electra Lane, commencing on August 15, 2004. (FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, parag. 37) Further, the Court declared that Defendant BECKY HALL unlawful detained the premises located at 1131 Electra Lane, in Sandy, Utah, from August 15, 2004, until her final removal on June 14, 2006. (FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, parag. 38)

Utah Code Section 78-36-10 requires that the District Court shall declare the forfeiture of the lease or agreement and award damages resulting from unlawful detainer. Further, subsection (3) provides that the "judgment shall be entered against the defendant for the rent . . . for three times the amount of damages assessed under subsections (2)(a) through (2)(c) and for reasonable attorney's fees if provided in the contract."

The Court found, that pursuant to Utah Code Section 78-36-3, and the delivery of the Notice on August 9, 2004, Defendant BECKY HALL was a tenant at will, and had the duty to remove herself from the premises located at 1131 E Electra Lane, on or before August 14, 2004. (FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER, parag. 36)

Second, the Court found that pursuant to Utah Code Section 78-36-10, Plaintiff SHARLENE FRANCISCONI is entitled to judgment declaring the forfeiture of the REAL ESTATE CONTRACT. (FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER, parag. 39)

Third, the District Court concluded that Plaintiff is entitled to damages resulting from the unlawful detainer of the premises. Pursuant to Utah Code Section 78-36-10(3), the District Court concluded that judgment should enter against Defendant in the amount of the rental value of the property, for three time the amount of damages assessed under subsection (2)(a) through (2)(c), and for reasonable attorney's fees. (FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER, parag. 41, 45)

CONCLUSION AND PRECISE RELIEF SOUGHT

This Court should dismiss the appeal, as the Notice of Appeal does not correctly appeal the

Judgment and Order (District Court File, pg. 746 - 748) As such, this Court is without jurisdiction except to dismiss the appeal and remand the case for the District Court to award Plaintiff/Appellee her costs and attorney's fees incurred on appeal.

If the Court determines that it properly has jurisdiction to consider the final order, entered in the FINDINGS OF FACT, CONLCUSIONS OF LAW, JUDGMENT AND ORDER, (Appellant's Opening Brief, Exhibit E), then the Court of Appeal should affirm the decision of the final decision of District Court, and Plaintiff and Appellee SHARLENE FRANCISCONI should be awarded all her costs and attorneys fees incurred in defending this appeal. The request for attorneys fees is based on the fact that the Real Estate Contract has an attorney fee provision and Plaintiff/Appellee is the prevailing party. Also, Plaintiff/Appellee has a statutory basis for the request of attorneys fees, as Utah Code Section 78-36-10 provides a basis for the Court to award Plaintiff/Appellee her attorney's fees.

ORAL ARGUMENT

Oral argument is not requested by Appellee in this case.

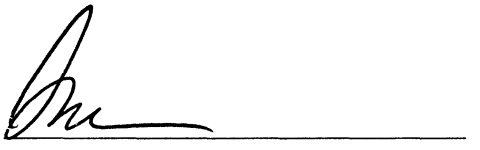
DATED this 30 day of October, 2007.

Gregory M. Constantino
Attorney for Plaintiff and Appellee SHARLENE FRANCISCONI

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing APPELLEE'S BRIEF was, this 30 day of October, 2007, mailed, postage pre-paid, to:

E. Craig Smay
Attorney at Law
174 East South Temple
Salt Lake City, Utah 84111



APPENDIX

A. Utah Code Section 78-2-2

B. Utah Code Section 78-36-3

C. Utah Code Section 78-36-10

D. Rule 15 of the Utah Rules of Civil Procedure

E. Rule 54 of the Utah Rules of Civil Procedure

F. Rule 3 of the Utah Rules of Appellate Procedure

G. Rule 4 of the Utah Rules of Appellate Procedure

H. Rule 24 of the Utah Rules of Appellate Procedure

I. Judgment and Order entered May 3, 2007

A

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-2-1; L. 1969, ch. 247, § 1; 1986, ch. 47, § 40; 1988, ch. 248, § 4; 1990, ch. 80, § 4.

Cross-References. — Chief justice, Utah Const., Art. VIII, Sec. 2.

Disqualification in particular case, Utah Const., Art. VIII, Sec. 2.

Judicial nomination and selection, Title 20A, Chapter 12.

Membership on board of control of state law library, § 9-7-301.

Proceedings unaffected by vacancy, § 78-7-21.

Qualifications of justices, Utah Const., Art. VIII, Sec. 7.

Retirement, Utah Const., Art. VIII, Sec. 15; Title 49, Chapters 17 and 18; §§ 78-8-103, 78-8-104.

Salary, Utah Const., Art. VIII, Sec. 14.

COLLATERAL REFERENCES

Utah Law Review. — Note, Death Qualification and the Right to an Impartial Jury Under the State Constitution: Capital Jury Selection in Utah After *State v. Young*, 1995 Utah L. Rev. 365.

Am. Jur. 2d. — 20 Am. Jur. 2d Courts §§ 67, 68.

C.J.S. — 21 C.J.S. Courts § 111 et seq.; 48A C.J.S. Judges §§ 3, 7, 8, 21 to 25, 85.

78-2-1.5, 78-2-1.6. Repealed.

Repeals. — Section 78-2-1.5 (L. 1969, ch. 225, § 2), relating to salaries of Supreme Court justices, was repealed by Laws 1971, ch. 182, § 4.

Section 78-2-1.6 (L. 1979, ch. 134, § 1; 1981, ch. 156, § 1), relating to salaries of justices, was repealed by Laws 1981, ch. 267, § 2, effective July 1, 1982.

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11; 1994, ch. 191, § 2; 1995, ch. 267, § 5; 1995, ch. 299, § 46; 1996, ch. 159, § 18; 2001, ch. 302, § 1.

Repeals and Reenactments. — Laws 1986, ch. 47, § 41 repeals former § 78-2-2, as enacted by Laws 1951, ch. 58, § 1, relating to original appellate jurisdiction of Supreme Court, and enacts the above section.

Amendment Notes. — The 2001 amendment, effective April 30, 2001, inserted "or charge" in Subsection (3)(i) and made stylistic changes.

Cross-References. — Chief justice to preside over impeachment of governor, § 77-5-2.

Election contest appeals, §§ 20A-4-406.

Extraordinary writs, Utah Const., Art. VIII, Sec. 3; U.R.C.P. 65B Utah R. App. P. 19.

Jurisdiction, Utah Const., Art. VIII, Sec. 3.

B

CHAPTER 36
FORCIBLE ENTRY AND DETAINER

Section		Section	
78-36-3	Unlawful detainer by tenant for term less than life	78-36-10	Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages
78-36-7	Necessary parties defendant		
78-36-8	Allegations permitted in complaint — Time for appearance — Service of summons	78-36-10 5	Order of restitution — Service — Enforcement — Disposition of personal property — Hearing
78-36-8 5	Possession bond of plaintiff — Alternative remedies		
78-36-9 5	Court procedures		

78-36-2. "Forcible detainer" defined.

NOTES TO DECISIONS

ANALYSIS

Liability
—Purchaser
"Unlawfully holds"

Liability.

—Purchaser.

In a property purchaser's suit against the U S Internal Revenue Service (IRS), where the IRS redeemed the property and paid the purchase price plus interest, but did not pay claimed excess expenses, the purchaser was entitled to compensation for legal expenses for an eviction action because the action was necessary to maintain the property MWT Props v Everson, 336 F Supp 2d 1163 (D Utah 2004)

"Unlawfully holds."

Evidence that defendant landlords refused to allow tenant to remove its equipment from the premises, directed the tenant's representative to leave the premises or they would contact the police, changed the locks without notifying the tenant or providing it a key, and on several occasions intentionally denied the tenant entry onto the premises supported the finding that defendants used force and unlawfully held possession of the premises in violation of this section Aris Vision Inst , Inc v Wasatch Prop Mgmt , Inc , 2005 UT App 326, 121 P3d 24, aff'd, 2006 UT 45, — P3d —

78-36-3. Unlawful detainer by tenant for term less than life.

(1) A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(a) when he continues in possession, in person or by subtenant, of the property or any part of it, after the expiration of the specified term or period for which it is let to him, which specified term or period, whether established by express or implied contract, or whether written or parol, shall be terminated without notice at the expiration of the specified term or period;

(b) when, having leased real property for an indefinite time with monthly or other periodic rent reserved:

(i) he continues in possession of it in person or by subtenant after the end of any month or period, in cases where the owner, his designated agent, or any successor in estate of the owner, 15 calendar days or more prior to the end of that month or period, has served notice requiring him to quit the premises at the expiration of that month or period; or

(ii) in cases of tenancies at will, where he remains in possession of the premises after the expiration of a notice of not less than five calendar days;

(c) when he continues in possession, in person or by subtenant, after default in the payment of any rent or other amounts due and after a notice in writing requiring in the alternative the payment of the rent and other amounts due or the surrender of the detained premises, has remained uncomplied with for a period of three calendar days after service, which notice may be served at any time after the rent becomes due;

(d) when he assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises, or when he sets up or carries on any unlawful business on or in the premises, or when he suffers, permits, or maintains on or about the premises any nuisance, including nuisance as defined in Section 78-38-9, or when the tenant commits a criminal act on the premises and remains in possession after service upon him of a three calendar days' notice to quit; or

(e) when he continues in possession, in person or by subtenant, after a neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, other than those previously mentioned, and after notice in writing requiring in the alternative the performance of the conditions or covenant or the surrender of the property, served upon him and upon any subtenant in actual occupation of the premises remains uncomplied with for three calendar days after service. Within three calendar days after the service of the notice, the tenant, any subtenant in actual occupation of the premises, any mortgagee of the term, or other person interested in its continuance may perform the condition or covenant and thereby save the lease from forfeiture, except that if the covenants and conditions of the lease violated by the lessee cannot afterwards be performed, or the violation cannot be brought into compliance, the notice provided for in Subsection (1)(d) may be given.

(2) Unlawful detainer by an owner resident of a mobile home is determined under Title 57, Chapter 16, Mobile Home Park Residency Act.

(3) The notice provisions for nuisance in Subsection (1)(d) are not applicable to nuisance actions provided in Sections 78-38-9 through 78-38-16 only.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-3; L. 1981, ch. 160, § 1; 1986, ch. 137, § 1; 1989, ch. 101, § 1; 1992, ch. 141, § 2; 2007, ch. 360, § 1.

Amendment Notes. — The 2007 amendment, effective April 30, 2007, substituted "calendar days" for "days" throughout the section; inserted "or other amounts due" twice in Subsection (1)(c); inserted "or when the tenant commits a criminal act on the premises" in Subsection (1)(d); substituted the language beginning "or the violation cannot" for "then no notice need be given" in the last sentence of Subsection (1)(e); and made a stylistic change in Subsection (3).

78-36-7. Necessary parties defendant.

(1) No person other than the tenant of the premises, a lease signer, and subtenant if there is one in the actual occupation of the premises when the action is commenced, shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or appearing in the proceedings are guilty, judgment shall be rendered against those parties.

(2) If a person has become subtenant of the premises in controversy after the service of any notice as provided in this chapter, the fact that such notice was not served on the subtenant is not a defense to the action. All persons who

C

(ii) an act that would be considered criminal affecting the health or safety of a tenant, the landlord, the landlord's agent, or other person on the landlord's property;

(iii) an act that would be considered criminal that causes damage or loss to any tenant's property or the landlord's property;

(iv) a drug- or gang-related act that would be considered criminal;

(v) an act or threat of violence against any tenant or other person on the premises, or against the landlord or the landlord's agent; and

(vi) any other act that would be considered criminal that the court determines directly impacts the peaceful enjoyment of the premises by any tenant.

(4) (a) At any hearing held in accordance with this chapter in which the tenant after receiving notice fails to appear, the court shall issue an order of restitution.

(b) If an order of restitution is issued in accordance with Subsection (4)(a), a constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff immediately.

(5) A court adjudicating matters under this chapter may make other orders as are appropriate and proper.

History: C. 1953, 78-36-9.5, enacted by L. 2007, ch. 360, § 5.

Effective Dates. — Laws 2007, ch. 360 became effective on April 30, 2007, pursuant to Utah Const., Art. VI, Sec. 25.

78-36-10. Judgment for restitution, damages, and rent — Immediate enforcement — Treble damages.

(1) (a) A judgment may be entered upon the merits or upon default.

(b) A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78-36-10.5.

(c) If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease or agreement.

(d) (i) A forfeiture under Subsection (1)(c) does not release a defendant from any obligation for payments on a lease for the remainder of the lease's term.

(ii) Subsection (1)(d)(i) does not change any obligation on either party to mitigate damages.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;

(d) the amounts due under the contract, if the alleged unlawful detainer is after default in the payment of amounts due under the contract; and

(e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(e), and for reasonable attorney fees.

(4) (a) If the proceeding is for unlawful detainer, execution upon the judgment shall be issued immediately after the entry of the judgment.

(b) In all cases, the judgment may be issued and enforced immediately.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-36-10; L. 1981, ch. 160, § 5; 1987, ch. 123, § 4; 1992, ch. 141, § 5; 1994, ch. 225, § 2; 2007, ch. 360, § 6.

Amendment Notes. — The 2007 amendment, effective April 30, 2007, subdivided Subsections (1) and (4); added Subsection (1)(d); in Subsection (2)(d), substituted "amount of rent" and similar language for "amounts due under the contract" twice; in Subsection (3), substituted "Subsections (2)(a) through (2)(e)" for "Subsections (2)(a) through (2)(c)" and "attorney fees" for "attorneys' fees, if they are provided for in the lease or agreement"; and deleted "after default in the payment of the rent" after "detainer" in Subsection (4)(a).

NOTES TO DECISIONS

ANALYSIS

Damages.
—Depreciation.
—Treble damages.

Damages.

—Depreciation.

In action against landlords for forcible entry and detainer, award to tenant of the depreciation in value of the equipment that defendants had seized was proper, as this placed the tenant in the same position it would have occupied had the conversion not been committed. Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 2005 UT App 326, 121 P.3d 24, aff'd, 2006 UT 45, — P.3d —.

—Treble damages.

All damages directly and proximately resulting from a forcible detainer are subject to the requirement that they be trebled. Therefore, district court properly trebled damages from loss, damage, and decrease in resale value when a landlord improperly kept surgical equipment for five months. Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt., Inc., 2006 UT 45, 143 P.3d 278.

78-36-10.5. Order of restitution — Service — Enforcement — Disposition of personal property — Hearing.

(1) Each order of restitution shall:

(a) direct the defendant to vacate the premises, remove his personal property, and restore possession of the premises to the plaintiff, or be forcibly removed by a sheriff or constable;

(b) advise the defendant of the time limit set by the court for the defendant to vacate the premises, which shall be three calendar days following service of the order, unless the court determines that a longer or shorter period is appropriate under the circumstances; and

(c) advise the defendant of the defendant's right to a hearing to contest the manner of its enforcement.

(2) (a) A copy of the order of restitution and a form for the defendant to request a hearing as listed on the form shall be served in accordance with Section 78-36-6 by a person authorized to serve process pursuant to Subsection 78-12a-2(1). If personal service is impossible or impracticable, service may be made by:

(i) mailing a copy of the order and the form to the defendant's last-known address and posting a copy of the order and the form at a conspicuous place on the premises; or

(ii) mailing a copy of the order and the form to the commercial tenant defendant's last-known place of business and posting a copy of the order and the form at a conspicuous place on the business premises.

(b) A request for hearing by the defendant may not stay enforcement of the restitution order unless:

D

filed 13 months after an answer to the complaint was filed and two weeks before the scheduled trial date, where reasons for the untimely motion were inadequate and where the parties failed to demonstrate that the court's denial of the motions resulted in prejudice. Tripp v. Vaughn, 746 P.2d 794 (Utah Ct. App. 1987).

Cited in Serr v. Rick Jensen Constr., Inc., 743 P.2d 1202 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 188 et seq.

C.J.S. — 67 C.J.S. Parties §§ 72 to 84.

A.L.R. — Defendant's right to contribution or indemnity from original tortfeasor, 20 A.L.R.4th 338.

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Compiler's Notes. — This rule is similar to Rule 15, F.R.C.P.

NOTES TO DECISIONS

Adequacy of pleading.
Amendments.
—Actual notice.
—After pretrial order.
—Alternative to dismissal.
——Payment of attorney fees.
——Prolix complaint.
—Amendment of response.
—Answer.
——To include counterclaim.

E

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922

PART VII. JUDGMENT

Rule 54. Judgments; costs.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.*

(c)(1) *Generally.* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) *Judgment by default.* A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) *Costs.*

(d)(1) *To whom awarded.* Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) *How assessed.* The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) *Interest and costs to be included in the judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.
(Amended effective January 1, 1985; November 1, 2003.)

Amendment Notes. — The 2003 amendment added the last sentence to Subdivision (a) and made stylistic changes

Compiler's Notes. — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985 See, now, Rule 34(d), Utah R App P

This rule is similar to Rule 54, F R C P

Cross-References. — Continuances, discretion to require payment of costs, U R C P 40(b)

State, payment of costs awarded against, § 78-27-13

Stay of judgment upon multiple claims, U R C P 62(h)

Witness fees, taxing as costs, § 78-46-30

NOTES TO DECISIONS

Absence of express determination
Amendment of pleadings
Appeal as of right
Certification not determinative
Costs
—In general
—Challenge of award
—Depositions
—Discretionary
—Expenses of preparation for action
—Extension of time for filing
—Failure to object
—Liability of state
—Mediation
—Service on adverse party
—Statutory limits
—Untimely filing of memorandum
—When not demanded
Default judgments
Effect of partial final judgment
Final order
—Appealability
—Attorney's fee award
—Certification
—Claims for relief
—Complete disposal of claim or party
—Effect of counterclaim
—No just reason for delay
—Review of finality
—Separate claims
Inconsistent oral statements
Interest on judgment
Interlocutory appeal
Judgment based on unpleaded theory
Judgment in favor of nonparty
Motion to reconsider
Pleading in the alternative
Presumption of finality
Real party in interest
Relief not demanded in pleadings
Specific performance request
Statute of limitations
Unpleaded issue tried by consent
Cited

Absence of express determination.

In action based on alleged breach of loan agreement, where trial court improperly dismissed plaintiff-corporation's complaint with prejudice and granted defendant-bank judgment on its counterclaim and cross-claim, judgment on cross-claim and counterclaim would be subject, on remand, to revision since all claims presented had not been adjudicated and since trial court made no express determination as required by this section M & S Constr & Eng'g Co v Clearfield State Bank, 24 Utah 2d 139 467 P2d 410 (1970)

Where an appeal would be untimely under Utah R App P 4(a) if a trial court's order were a final judgment and where no certification order was entered pursuant to this rule, the appellate court lacked jurisdiction to resolve issues regarding whether the summary judg ments disposed of a cause of action (Unpublished decision) Whaley v Park City Mun Corp , 2004 UT App 304

Amendment of pleadings.

Under Rule 15(b) and Subdivision (c)(1) of this rule, amendments should be allowed if a case has actually been tried on a different issue or a different theory than had been pleaded First Sec Bank v Colonial Ford, Inc , 597 P2d 859 (Utah 1979)

Appeal as of right.

Where the requirements of this rule concerning appeal of orders in multi-party or multiclaim actions are satisfied, the parties are entitled to appeal such orders as a matter of right, and the Supreme Court does not have discretion to refuse to review the orders Pate v Marathon Steel Co , 692 P2d 765 (Utah 1984)

After a party or parties have availed themselves of the provisions of Subdivision (b), al lowing an entry of judgment on "fewer than all of the claims or parties," an appeal may be had on the adjudicated claims or by those parties All Weather Insulation, Inc , v Amiron Dev Corp , 702 P2d 1176 (Utah 1985)

Certification not determinative.

This rule does not necessarily mean there is a final judgment merely because the court's order

F

provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.
(Amended effective May 3, 2004.)

Advisory Committee Note. — Rule 4(b) is added to the list of those rules that the appellate court may not suspend. The former list of rules that the appellate court could not suspend concerned procedures and time limits that confer jurisdiction upon the court. Under Rule 4(b), the post-judgment motions listed must be filed in a timely manner in the trial court. If the motions are not filed in a timely manner, the appellant may not take advantage of Rule 4(b) that allows 30 days from the disposition of the motion to file the appeal. Both appellate courts treat the failure to file post-judgment motions in a timely manner as a jurisdictional defect. Burgers v. Meredith, 652 P.2d 1320 (Utah 1982).

Amendment Notes. — The 2004 amendment added Rules 52 and 59 to the list of exceptions.

NOTES TO DECISIONS

Timely filing
Cited.

Timely filing.
When a motion for summary disposition was clearly meritorious, it would support a suspension of the time limitation contained in Rule 10, Utah R. App. P. Bailey v. Adams, 798 P.2d 1142 (Utah Ct. App. 1990).

Cited in Dulin v. Cook, 957 F.2d 758 (10th Cir. 1992); In re J.J.L., 2005 UT App 322, 119 P.3d 315; C.F. v. State (State ex rel. A.M.), 2005 UT App 2, 516 Utah Adv. Rep. 17, 106 P.3d 193

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

Rule 3. Appeal as of right: how taken.

(a) *Filing appeal from final orders and judgments.* An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) *Joint or consolidated appeals.* If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) *Designation of parties.* The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) *Content of notice of appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) *Service of notice of appeal.* The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A

certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) *Filing fee in civil appeals.* At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall not accept a notice of appeal unless the filing fee is paid.

(g) *Docketing of appeal.* Upon the filing of the notice of appeal and payment of the required fee, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.
(Amended effective October 1, 1992; November 1, 1996; November 1, 1999.)

Advisory Committee Note. — The designation of parties is changed to conform to the designation of parties in the federal appellate courts.

The rule is amended to make clear that the mere designation of an appeal as a "cross-appeal" does not eliminate liability for payment of the filing and docketing fees. But for the order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

Cross-References. — Justice courts, appeals from, § 78-5-120.

Juvenile courts, appeals from § 78-3a-909.

NOTES TO DECISIONS

Absence of record.
Additur.
Appeal by defendant.
Appeal by prosecution.
Attorney fees.
Content of notice.
Denial of intervention.
Dismissal by trial court.
Filing fees.
Filing of notice.
Final order or judgment.
—Permanency order in child welfare case.
—Attorney fees.
—Partial summary judgment.
—Probate.
—Sentencing.
—Summary lien nullification.
Judgment nunc pro tunc.
Jurisdiction.
Motion to strike.
New trial.
Partial judgment.
Party misconduct.
Postjudgment orders.
Purpose of notice.
Review in equity cases.
Review of acquittal prohibited.
Summary judgment.
Time for filing.
Unsigned minute entry.
Cited.

Absence of record.

There was nothing for the court to review where the alleged error was not made part of the record. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174 (Utah 1977).

Additur.

While a defendant may refuse to accept a proposed additur, he may not appeal from an additur that he has accepted, and if he refuses the additur, a new trial must follow, and the grant of a motion for a new trial is not appealable because it is not a final judgment. Dalton v. Herold, 934 P.2d 649 (Utah 1997).

Appeal by defendant.

A purported second judgment and sentence, which was clearly an attempt to render a judgment in criminal proceeding which if valid would have affected defendant's rights, was appealable. State v. Alexander, 15 Utah 2d 14, 386 P.2d 411 (1963) (decided under former U.R.Crim.P. 26).

Appeal by prosecution.

District court's judgment, discharging defendant in criminal prosecution and releasing his bail, entered on plea to court's jurisdiction, was final judgment from which state might appeal. State v. Booth, 21 Utah 88, 59 P. 553 (1899).

State had right of appeal from judgment discharging defendant, in prosecution for felony, on ground that information did not state facts sufficient to constitute public offense. State v. McKenna, 24 Utah 317, 67 P. 815 (1902).

The state had no right to appeal sentence imposed upon defendant since the imposition of sentence was part of the judgment, and not an order made after judgment. State v. Kelbach, 569 P.2d 1100 (Utah 1977).

Former section did not authorize the prosecution to appeal an acquittal, no matter how overwhelming the evidence against the defendant may be. State v. Musselman, 667 P.2d 1061 (Utah 1983).

G

gomery, 2003 UT App 405, 487 Utah Adv. Rep. 3, 82 P.3d 191, cert. denied, 90 P.3d 1041 (Utah 2004); Rosas v. Eyre, 2003 UT App 414, 487 Utah Adv. Rep. 13, 82 P.3d 185.

COLLATERAL REFERENCES

Utah Law Review. — Case Law Development: I. Appellate Review and Procedure, 1998 Utah L. Rev. 585.

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

Rule 4. Appeal as of right: when taken.

(a) *Appeal from final judgment and order.* In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Time for appeal extended by certain motions.*

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) *Filing prior to entry of judgment or order.* A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) *Additional or cross-appeal.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) *Extension of time to appeal.* The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) *Motion to reinstate period for filing a direct appeal in criminal cases.* Upon a showing that a criminal defendant was deprived of the right to appeal,

the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that he was deprived of his right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) *Appeal by an inmate confined in an institution.* If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. If a notice of appeal is filed in the manner provided in this paragraph (f), the 14-day period provided in paragraph (d) runs from the date when the trial court receives the first notice of appeal.

(Amended effective November 1, 1998; April 1, 1999; November 1, 2002; November 1, 2005; November 1, 2006.)

Advisory Committee Note. — Subsection (f) was adopted to implement the holding and procedure outlined in *Manning v. State*, 2005 UT 61, 122 P.3d 628.

Amendment Notes. — The 2005 amendment rewrote Subdivision (b), which had been titled "Motions post judgment or order"; in Subdivision (c), deleted "Except as provided in paragraph (b) of this rule" from the beginning and "of the trial court" after "order"; substituted "paragraphs (a) and (b)" for "paragraph (a)" in Subdivisions (d) and (e); and made related and stylistic changes.

The 2006 amendment added Subdivision (f), redesignating former Subdivision (f) as (g).

NOTES TO DECISIONS

Administrative actions.
Attorney fees.
Attorney's failure to file notice.
Cross-appeal.
Extension of time to appeal.
—Amendment or modification of judgment.
—Construction.
—Denied.
—Good cause.
—Jurisdiction.
Filing of notice.
Filing with county clerk.
Final order or judgment.
Form of notice.
Jurisdiction.
Post-judgment motions.
Pre-judgment motions.
Premature notice.
Reconsideration of order.
—Child welfare proceedings.
—Date of notice.
—Final judgments.
Timeliness of notice.
—Denial of motion.
—Entry of judgment.
—Premature motion for new trial.
—Prisoners.
—Sentencing.
Cited.

Administrative actions.

Subdivision (c) does not apply to petitions for review of administrative actions. Maverik Country Stores, Inc. v. Industrial Comm'n, 860 P.2d 944 (Utah Ct. App. 1993).

The cross-appeal provisions of this rule do not apply to proceedings for judicial review of agency decisions. Viktron/Lika Utah v. Labor Comm'n, 2001 UT App 8, 18 P.3d 519.

Attorney fees.

No cross-appeal is necessary where plaintiffs merely sought attorney's fees incurred in defending their judgment on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

Attorney's failure to file notice.

Where if, within the statutory period for appeal, defendant has requested counsel to take an appeal and counsel gave defendant reason to believe that he would but then failed to do so, the remedy to establish the denial of his right to appeal is not in the Supreme Court but by a motion for relief under Rule 65B(i), U.R.C.P. in the sentencing court. State v. Johnson, 635 P.2d 36 (Utah 1981) (decided under former U.R.Crim P. 26).

If it is found upon a hearing that a defendant was induced, by reason of his attorney's representation that an appeal would be perfected, to allow his time to take an appeal to expire, or that he was misled as to his right to appeal, the defendant should be resentenced nunc pro tunc upon previous finding of guilt so as to afford

H

Cited in State v Classon, 935 P 2d 524 (Utah Ct App 1997), cert granted, 945 P 2d 1118 (Utah 1997), State v Bredehoft, 966 P 2d 285 (Utah Ct App 1998), cert denied, 982 P 2d 88 (Utah 1999) State v Simmons, 2000 UT App 190 398 Utah Adv Rep 7, State v Mecham, 2000 UT App 247, 9 P 3d 777

Rule 24. Briefs.

(a) *Brief of the appellant* The brief of the appellant shall contain under appropriate headings and in the order indicated

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties The list should be set out on a separate page which appears immediately inside the cover

(a)(2) A table of contents, including the contents of the addendum, with page references

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited

(a)(4) A brief statement showing the jurisdiction of the appellate court

(a)(5) A statement of the issues presented for review, including for each issue the standard of appellate review with supporting authority, and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court, or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule

(a)(7) A statement of the case The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below A statement of the facts relevant to the issues presented for review shall follow All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule

(a)(8) Summary of arguments The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief It shall not be a mere repetition of the heading under which the argument is arranged

(a)(9) An argument The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on A party challenging a fact finding must first marshal all record evidence that supports the challenged finding A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award

(a)(10) A short conclusion stating the precise relief sought

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick If the addendum is bound separately, the addendum shall contain a table of contents The addendum shall contain a copy of

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief,

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion, in all cases any court opinion of central importance to the

appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) *References in briefs to the record.* References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) *Length of briefs.* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) *Permission for over length brief.* While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) *Requirements and sanctions.* All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006; November 1, 2006.)

Advisory Committee Note. — Rule 24 (a)(9) now reflects what Utah appellate courts have long held. *See In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. '[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Amendment Notes. — The 2003 amendment deleted Subdivision (k) pertaining to brief covers.

The 2004 amendment added the last sentence in Subdivision (a)(9).

The April 2006 amendment substituted "this paragraph" for "this rule" in the last sentence in Subdivision (g), deleted "and may be exceeded only by permission of the court. The court shall grant reasonable requests, for good cause shown" from the end of Subdivision (b), and added Subdivision (h), making related changes.

The 2006 amendment rewrote Subdivision (g).

I

Gregory M. Constantino, (A 6853)
CONSTANTINO LAW OFFICE, P.C.
8537 S Redwood Rd., Suite D
West Jordan, Utah 84088
(801) 748-4747

Attorneys for Plaintiff

THIRD JUDICIAL DISTRICT COURT

SALT LAKE DEPARTMENT, COUNTY OF SALT LAKE, STATE OF UTAH

SHARLENE FRANCISCONI, Plaintiff, vs. BECKY HALL, and individual, Defendants.	**JUDGMENT AND ORDER** Case No. 0409 22431 EV JUDGE: LINDBERG

The above-entitled matter, came on for Trial on January 3rd, 2007, before the Hon. Denise Lindberg. Plaintiff was represented by her attorney, Gregory M. Constantino. Defendant was represented by her attorney, Craig Smay. The parties presented evidence at trial. The Court heard the testimony of Sharlene Francisconi, Becky Hall, Kim Aiken and Steve Brantley. Plaintiff's Trial Exhibits and Defendant's Trial Exhibits were admitted into evidence. The Court has previously entered its findings of fact and conclusions of law, and now, for good cause appearing, IT IS HEREBY ORDERED THAT:

1. Possession of the premises at the address, 1131 E. Electra Lane, Sandy, Utah, shall be delivered to the Plaintiff. The Defendant BECKY HALL and the property, and

all persons claiming a right to occupancy through Defendant, shall be removed from the premises. All rights to occupancy through Defendant, arising from the Real Estate Purchase Agreement (Plaintiff's Exhibit 2) are terminated.

2. An Order of Restitution was issued and served upon the Defendants on June 7, 2006, and June 14, 2006, in accordance with Rule 4, of the Utah R. of Civ. Proc , and Utah Code Section 78-36-10.5. The Court rules that the eviction which occurred pursuant to the issuance and service of the Order of Restitution was proper and appropriate.

3. Plaintiff SHARLENE FRANCISCONl is awarded judgment against said Defendant BECKY HALL, in the amount of:

Treble Damages from August 15, 2004, to June 14, 2006,	
in the amount of:	76,800.00
Court Costs to date of Judgment:	228.25
Attorney fees:	10,500 00
Offset allowed for down payment:	- 30,000.00
Total judgment:	**$57,528.25**

With interest on the total judgment at 6.99% per annum as allowed by law from the date of this judgment until paid, and it is further order that his judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment.

DATED this 30th day of April, 2007.

BY THE COURT

Judge Denise P. Lindberg

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a true and correct copy of the foregoing **JUDGMENT AND ORDER** has, this 11 day of April, 2007, mailed first class, postage-prepaid to:

E. Craig Smay
Attorney at Law
174 East South Temple
Salt Lake City, Utah 84111